

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1003

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

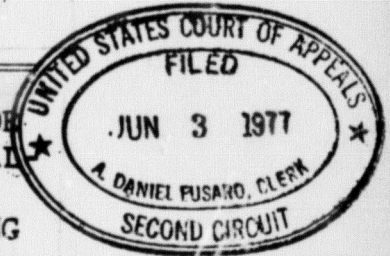
Appellee,

v.

SEYMOUR C. FELDMAN,

Defendant-Appellant.

PETITION FOR REHEARING AND PETITION FOR
REHEARING EN BANC WITH MOTION IN THE AL-
TERNATIVE TO RECALL THE MANDATE DATED
THE 20TH DAY OF MAY, 1977, AND GRANTING
A STAY THEREAFTER PENDING CERTIORARI



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 77-1003
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PETITION FOR REHEARING
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IN THE ALTERNATIVE TO
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THE 20TH DAY OF MAY, 1977,
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THEREAFTER PENDING
CERTIORARI

TO THE HONORABLE MOORE, SMITH AND MULLIGAN,
Circuit Judges:

The petitioner, SEYMOUR C. FELDMAN, M.D.,
respectfully petitions this Court for a rehearing of
the order of this Court made the 20th day of May, 1977,
affirming his conviction for "Medicare" violations and
related mail fraud.

We specifically also ask this Court to recall its mandate of May 20, 1977, and to grant a stay thereof pending determination of this motion for rehearing and pending a petition for certiorari in the event an application for rehearing is ultimately not successful.

REASONS FOR GRANTING
A REHEARING

1. An unusual and dramatic event occurred early in the trial, during which the Trial Judge proclaimed that the trial attorney, Mr. Martin, had a conflict of interests which would preclude him from utilizing what the Court itself described as an essential witness, namely a member of his law firm, Miss Santangelo.

This arose by virtue of the fact that Miss Santangelo had interviewed several of the prosecution witnesses in the case prior to trial, and since she was considered a member of the defense lawyer's firm, the Trial Judge declared that her testimony was forbidden under the Canons of Ethics and the Disciplinary Rules, all of which we have set forth in our main brief.

Judge Conner offered the defendant the choice of a mistrial with an opportunity to get new counsel. The allocution, however, was conducted outside the presence of the Court by the very attorney who was in conflict with his client.

In COOPER v. FITZHARRIS, 9 Cir., 4/11/77, the United States Court of Appeals for the Ninth Circuit ruled that there can be no application of any "Harmless Error Doctrine" where the claim is ineffective assistance of counsel.

The Court, in COOPER v. FITZHARRIS, 21 Cr.L. 2127, distinguished CHAPMAN v. CALIFORNIA, 386 U.S. 18, on the grounds that the right to counsel cannot be treated as harmless error. See also, HERRING v. NEW YORK, 422 U.S. 853, and GEDERS v. UNITED STATES, 425 U.S. 80, both of which cases adhere to "a prophylactic rule in right to counsel cases".

These decisions serve to reemphasize the Supreme Court's decision in GLASSER v. UNITED STATES, 315 U.S. 60, that the right to counsel "is too fundamental to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

We have detailed in our main brief the fact that in the crucial decision which Dr. Feldman had to make as to whether or not to change attorneys in mid-stream by accepting a mistrial, he should have had the advice and aid of an impartial attorney and not one who was himself the cause for the proffered mistrial and who had a strong financial interest in convincing FELDMAN not to change lawyers.

2. We also ask this Court to review and reconsider the argument that since the Government was unable to specify on which dates the claims for services were untrue, that the jury thereby may well have been less than unanimous because various jurors could have chosen different dates on which the alleged false claims for services arose. (See UNITED STATES v. NATELLI, 2 Cir. 1975, 327 F.2d 311, 329, 330).

3. We ask this Court to again review, or submit for en banc consideration, the use of statements of a negative nature, namely to the effect that DR. FELDMAN did not give an answer and could not explain.

These negatives are wholly improper since the fact that a person does not say something or fails

to give an explanation, cannot be used against him.
(See DOYLE v. OHIO, 426 U.S. 16; UNITED STATES v. HALE,
422 U.S. 171).

4. We also ask this Court to rehear and reconsider the speedy trial issue which we raised under UNITED STATES v. MARION, 404 U.S. 307, wherein it was obvious that the Government could have indicted DR. FELDMAN several years before they did since they had fully interviewed him and learned of the alleged criminal transgressions in 1973, but did nothing about them until 1976. (See DILLINGHAM v. UNITED STATES, 96 S.Ct. 303. See also, MANN v. UNITED STATES, 304 F.2d 394, 396-397, (D.C. Cir. 1962)).

5. If, for any reason, this Panel of the Court ultimately adheres to its original determination, we suggest that this matter be circulated for consideration en banc.

6. We also, in the alternative, move to have the mandate recalled and the defendant-appellant returned to his status quo ante, which was on his own recognizance, until the determination of this rehearing is made.

In addition, we would ask that the stay of mandate be granted pending certiorari if the rehearing application is ultimately resolved against DR. FELDMAN.

CONCLUSION

The petition for rehearing should be granted and the mandate dated May 20, 1977, should be recalled or, in the alternative, a stay of mandate be granted pending certiorari.

Respectfully submitted,

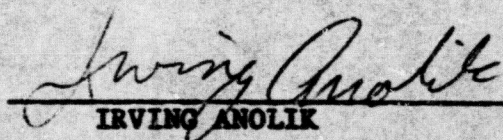


IRVING ANOLIK,
Attorney for Defendant-Appellant
SEYMOUR C. FELDMAN.

CERTIFICATION

I, IRVING ANOLIK, attorney for appellant SEYMOUR C. FELDMAN, hereby certify that this petition for rehearing, etc., is made in good faith and not for the purpose of delay.

DATED: May 27, 1977.


IRVING ANOLIK

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK

COUNTY OF *NY*

BEATRICE STARK being sworn, says:
I am not a party to this action; I am over 18 years
of age; I reside at *Queens NY*.

On *2 June* 19*77* I served
the within *PETITION for Rehearing*
upon *US attys DNY*

the attorney(s) for *USA* in this
action, at *1 ST Andrews Pl. NYC 10007*

the address designated by said attorney(s) for that
purpose by depositing a true copy of same enclosed
in a postpaid, properly addressed wrapper, in an
official depository under the exclusive care and
custody of the United States Postal Service within
the State of New York.

Beatrice L. Stark

Type or Print Name Below Signature

Sworn to before me

this *2* day of *June* 19*77*.

Irving Anolik
IRVING ANOLIK, NOTARY PUB.
New York 0079900 Rockland
Com. Expires March 1, 1979